IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1444

CAROL C. JOHNSON,

Petitioner,

—v.—

LOUIS J. LEFKOWITZ, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York, N. Y. 10025

April 10, 1978

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Citations

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IN THE

Supreme Court of the United States

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No. .....

CAROL C. JOHNSON,

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—v.—

LOUIS J. LEFKOWITZ, individually and as New York State Attorney General and as head of the New York State Law Department which contains the Real Property Bureau and VICTOR S. BAHOU, ERSA H. POSTON and JOSEPHINE L. GAMBINO, as, respectively, President, Member and Member of the New York State Civil Service Commission and ARTHUR LEVITT as New York State Comptroller who as such is Administrative Head of the New York State Employee's Retirement System,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Honorable Associates Justices of the Supreme Court of the United States

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment, order, decision and opinion of the United States Court of Appeals for the Second Circuit dated and entered in this proceeding on

December 14, 1977, docket number 77-7281. (Southern District Court Docket number 77 Civil 1547)

Opinion Below

The opinion of the Court of Appeals Second Circuit is reported in the advanced pamphlets, 566 F.2d (No. 3) (Dated February 13, 1978) Page 866 and is set forth in the Appendix Page 1a.

The opinion of the District Court, Southern District of New York, seems not to have been reported. It is set forth in the Appendix Page 8a.

The conflicting opinion of the Court of Appeals Seventh Circuit appears not to be as yet reported but is set forth in the Appendix Page 10a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated and entered December 14, 1977, which called for the filing of this petition on or before March 14, 1978; however, time for filing was extended by order of this Supreme Court, dated March 3, 1978 to and including April 13, 1978.

Jurisdiction in the District Court was found as is set forth in the first part of the complaint set forth herein in full under Statement of the Case.

Jurisdiction of the Second Circuit Court of Appeals is found in and based on 28 U.S.C. 1291.

Jurisdiction of the U.S. Supreme Court is invoked under the provisions of 28 U.S.C. 1254(1).

Jurisdiction as to granting of the extension of time is found in and based on (1) 28 U.S.C. 2601 (c), (2) U.S. S. Ct. Rule 22 (3), (4), and U.S. S. Ct. Rule 19(b).

Questions Presented

Issues

Relying upon rule 23(c) as to subsidiary questions being considered the overall question presented is whether the District Court erred is dismissing the complaint upon motion made pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Practice before answer and unsupported by any proof by affidavits and under which procedure all allegations of the complaint are to be taken as admitted as true for the purpose of the motion and whether the Circuit Court erred in affirming the District Court's dismissal of the Complaint.

This involves a question of whether the four cases concerning Mandatory Retirement Acts cited in the opinions of the District Court and Second Circuit Court, discussed under Reasons for Granting the Writ, are properly to be considered stare decisis as to the Mandatory Retirement Act herein especially considered with respect to the action taken thereunder.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment Article Fourteenth

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

New York State Retirement and Social Security Law, Chapter 51-A of the Consolidated Laws, Article 2, Title 8—General Provisions relating to Retirement; Retirement Plans applicable to members generally:

Section 70, Superannuation retirement.

"b. Any member who attains age seventy shall be retired on the first day of the calendar month next succeeding such event. Such retirement shall be on the basis of 'Option One-half' unless the member files an effective election pursuant to section ninety of this article to retire on a different basis. If he shall have filed such an election, his retirement allowance shall be computed in accordance with the basis so selected by him. The provisions of this subdivision with respect to mandatory retirement shall be inapplicable to:

1. An elective officer.
2. A judge.
3. A justice.
4. An official referee.
5. A person holding office by virtue of an appointment to fill a vacancy in an elective office.
6. An employee of the port of New York authority.
7. A person who last became a member before April eleventh, nineteen hundred forty-five, and who

serves continuously after such date in one or more of the following capacities:

(a) A clerk of a court, as provided in the constitution, article six, section twenty-one.

(b) An appointee of the governor.

(c) An employee of the legislature drawing an annual salary, or

(d) A chaplain of a county penal institution having served as such chaplain for not less than thirty years, or

8. A commissioner of elections.

(c) Notwithstanding the provision of subdivision b of this section, the state civil service commission may approve the continuance in service of members who have attained age seventy. Such approvals shall be for periods not to exceed two years each. No such approval shall be given unless:

1. The head of the department in which the member is employed shall file a written statement with the comptroller approving such continuance, and
2. The medical board shall certify that such member is physically fit to perform the duties of his position, and
3. The state civil service commission shall find that:
   (a) Such member is less than seventy-eight years of age, and
   (b) His continuance in service would be advantageous because of his expert knowledge and special qualifications.

The service of any such member may, however, be terminated at any time by the head of the department in which he is employed, upon sixty days written notice to such member".

The Statement of the Case

A statement of this case is best stated by setting forth the complaint, dated and filed March 31, 1977, which was dismissed on motion made under Federal Rules of Procedure Rule 12(b)(1) [Court lacks jurisdiction of the subject matter] and 12(b)(6) [Complaint fails to state a claim upon which relief can be granted] under which all allegations of the complaint must be taken as true. The District Court's decision was affirmed by the Circuit Court.

The Complaint reads as follows:

COMPLAINT

Docket No. 77, Civ. 1547
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAROL C. JOHNSON,

Plaintiff,

—v.—

LOUIS J. LEFKOWITZ, individually and as New York State Attorney General and as head of the New York State Law Department which contains the Real Property Bureau and VICTOR S. BAHOU, ERSA H. POSTON and JOSEPHINE L. GAMBINO, as, respectively, President, Member and Member of the New York State Civil Service Commission and ARTHUR LEVITT as New York State Comptroller who as such is Administrative Head of the New York State Employee's Retirement System,

Defendants.

INTRODUCTION

This is an action seeking a permanent injunction and relief on Federal Constitutional grounds to undo the wrong and damage which has been done and which continues to be done to plaintiff by the New York State Mandatory Retirement Statute, Section 70 of the New York Retirement Law and by the actions of the Defendants herein under color of the said statute and to have the statute and the actions under color thereof declared unconstitutional and void.

JURISDICTION

The jurisdiction of this Court is found in and based on

(a) 28 U.S.C. 1331—Federal Question and $10,000 requirement

(b) 28 U.S.C. 1343—Civil Rights

(c) 28 U.S.C. 2201—Declaratory Judgment

(d) 28 U.S.C. 2202—Further Relief

(e) 42 U.S.C. 1983—Civil Action for deprivation of Civil Rights

(f) 42 U.S.C. 1985—Conspiracy

(Rights and prohibition as to State Action)

(g) Sections 1 and 5 of the Fourteenth Amendment (U.S. Constitution) concerning Privileges and Immunities, Due Process and Equal Protection

(h) Section 10 of original Article 1 (U.S. Constitution) re Laws impairing the obligations of Contracts

(i) Section 10 of original Article 1 (U.S. Constitution) re Bill of Attainder which includes Pains and Penalties

(j) Original Article VIII (U.S. Constitution) re Cruel and unusual punishment—applicable to state action (as both i and j apply to civil actions)

and it is alleged that the amount in controversy herein exceeds $10,000 exclusive of interest and costs and that this action arises under the Constitution and Laws of the United States.

This action seeks a permanent injunction against all defendants enjoining their continuing their actions which have injured plaintiff as alleged herein and from their continuing their refusal to make plaintiff whole and from continuing to injure plaintiff by continuing to apply and enforce Section 70 of the New York Retirement Act independently and under color of said statute to Plaintiff's detriment which injunction is sought on the ground that the statute and the said actions under color thereof violate the Federal Constitution.

PARTIES

Plaintiff alleges that the four defendants last named in the caption, namely, the three who are members of the Civil Service Commission and the New York State Comptroller have an interest herein in that they in their official capacity have an interest in that plaintiff seeks to be restored to his tenured civil service position as of midnight of the date he was unconstitutionally involuntarily mandatorily retired and plaintiff seeks back pay from the date of such termination and for all relief necessary to make him whole for the unconstitutional discharge as above stated all of which involves all of the defendants herein and the Commission and the Comptroller are further involved by allowing plaintiff to be dismissed and stopping

his pay although he had made it clear to all that he wished to retain his tenured position and receive his pay.

FACTS

Plaintiff alleges as follows:

1. In the year 1962 plaintiff, an attorney, saw a posted announcement which gave notice that the State of New York was about to give a Civil Service Competitive Examination to recruit attorneys in the field entitled "Senior Attorneys-Realty" for positions that in major part involved reading title abstracts to determine the owners of properties being taken by appropriation by the State for Roadways and Parks and Recreation Centers and other kindred miscellaneous purposes.

2. Plaintiff obtained an application which had printed thereon a statement that "New York Law prohibits discrimination because of age, sex or race."

3. Plaintiff filled in the application and duly took and passed the examination with a grade of 82.

4. Thereafter Plaintiff after having been interviewed was notified to appear for work as a Senior Attorney-Realty in the Real Property Bureau of the New York State Law Department headed by the State Attorney General and Plaintiff did so appear on January 10, 1963, the date set, and commenced to work on that date.

5. Plaintiff was notified that all attorneys in starting were on probation for 6 months and if retained after that period they became permanent, tenured, competitive classified Senior Attorneys-Realty in the Real Property Bureau of the New York State Law Department and in this way Plaintiff became such.

6. Mr. Louis J. Lefkowitz, defendant herein, was then and is now the New York State Attorney General and as such the head of the New York State Law Department in which Plaintiff was employed and Mr. Edward R. Amend was his subordinate assistant Attorney General in charge of the Real Property Bureau in the Law Department.

7. In or about 1968 Plaintiff then working in the aforesaid position in Albany near the State Capitol again took a new examination in the same classification (Senior Attorney-Realty) in order to place himself on a new list so as to be in position for transfer from Albany to New York City should an opening occur there in the New York City Branch of the Real Property Bureau. Under date of February 5, 1968 Plaintiff received notice that he had received a grade of 100% and was number 1 on the list. Plaintiff was informed that some 200 had taken the examination.

8. On June 21, 1973 Plaintiff became 70 years of age. His annual ratings during the ten year period 1963 to 1973 had all been satisfactory. He was nevertheless informed that Section 70 of the New York State Retirement Law required that he be mandatorily retired as of and on the end of the last day of the month in which he became 70, namely, June 30, 1973.

9. Plaintiff read the law, Section 70, and found that it provided for continuances up to the age 78 and plaintiff duly applied for a continuance which could be granted in steps of not more than 2 years at a time. In order to meet the statutory requirements for continuance Plaintiff underwent a physical examination under State control and passed same and passed the Civil Service Commission requirement by having that body pass on his job qualifications as having the requisite expert knowledge and the desirability of having him continue and the extension was approved by the Attorney General, as head of the Law Department thus meeting all of the requirements set up by section 70 of the Retirement Law, and an extension was granted.

10. The United States Attorney Generals in two opinions dealing with such applications under similar United States Civil Service law had ruled that when the physical and Civil Service requirements were met that the approval of the Attorney General was to be given as a matter of course and the extensions were to be in 2 year periods.

11. The extension given Plaintiff, however, was for only a 6 months period extending thru December 31, 1973.

12. Plaintiff towards the end of the 6 months period duly applied for a further extension, a second extension, but again was granted only a short three months extension thru March 31, 1974.

13. Some others similarly situated had on their initial application been granted longer extension than 9 months.

14. Plaintiff duly applied for a further (third) extension but the Attorney General took no action to approve. Plaintiff thus became involuntarily mandatorily retired as of the end of March 31, 1974. No reason was given, nor any hearing, and plaintiff's subsequent request for a hearing was refused by the Attorney General.

15. The said actions of the Attorney General were without justification and were unreasonable arbitrary and impermissible discriminatory as above set forth. The Attorney General's action was in violation of the intendment

of the Civil Service law which had given Plaintiff tenure based on fitness and merit. Said action violated the spirit of Section 70 of the Retirement Act which act however plaintiff alleges was unconstitutional as there was incorporated in it a provision that the department head must approve before a continuance could be granted but set no control against abuse of the discretion delegated to the department head and thus there was delegated legislative power allowing for defeat of the purpose and spirit of the law and in effect even allowing the Attorney General to set up a new law all of which allowed for the unconstitutional abuse under color of the statute which the Attorney General engaged in herein as above set forth by refusing approval of continuance to plaintiff who had proved his fitness and merit to continue on to 78.

16. Plaintiff in obtaining his second continuance had obtained an interview with the Attorney General by the intervention, in his behalf, of the Hon. James Farley who was then in his 80ties and Otto Koegel, aged 83, a senior attorney in the firm of Royall, Koegel and Wells, with whom Plaintiff had worked in the Law firm of Hughes, Schurman & Dwight, and Senator Javits who has been interested in the problems of the aged, and Senator Buckley and others.

17. At this interview there was present Mr. Albert R. Singer, Administrative Director to the Attorney General who was interested in bringing in 10 young men who had just passed the bar to do work coming in to the Real Property Bureau with desire to bring in 10 more additional men, and also present were Mr. Edward R. Amend and also Mr. Nicholas Barry, Jr., Plaintiff's immediate supervisor who had written in support of retaining plaintiff because of plaintiff's knowledge of all three branches of the legal work.

18. All of the above except Mr. Barry kept saying we must retire you because you are over seventy. No attention was paid to plaintiff's telling them that the law did not so require but in fact provided for continuance up to age 78, they made no attempt to deny that the law so provided, simply remaining silent. It became apparent that their position was arbitrarily taken to achieve some end that they had in mind outside the purpose of the statute and that they were unconstitutionally abusing the discretion which the statute unconstitutionally delegated in order to force plaintiff out of his tenured position.

19. Plaintiff pointed out that 10 men who had just passed the bar examination were just being hired in the anticipation of the receipt of $200,000,000 of the $1,150,000,000, voted by the people, in a recent election for use under the Environmental Quality Bond Act which would result in work for the Real Property Bureau plus a matching sum of $200,000,000 to be received from the United States Government for a total of $400,000,000 and that the older men still there would be needed.

20. Plaintiff further pointed out that Mr. Amend, who was present, had told him that the incoming work had fallen off for a short time to some extent that the attorney force had fallen off to a greater degree through deaths and resignations so that each attorney remaining on the force had more to do per attorney than before and that the rate of incoming work was increasing and that the work load was back to about 82% and was expected to increase to its high period in the late 60ties.

21. Plaintiff further pointed out that the 10 men being employed had not taken nor passed the Senior Attorney-Realty Civil Service examination and that even after they

had done so and if they passed it would take several years before they were broken in and that his immediate supervisor had written in support of plaintiff's being kept on because he was familiar with three of the most important branches of work that were being handled by the Real Property Bureau and by that time the older force would be depleted by deaths and resignations, so that forcing involuntary retirement would only hamper the work of the Bureau, and such as plaintiff would not need to be fired.

22. The Attorney General then said "I am not firing you" and then again repeated "you are being mandatorily retired". Plaintiff then said, "either way I lose my job, why?" The Attorney did not and would not answer. Plaintiff was not then nor at any later time given any reason and given no chance to meet any point.

23. Mr. Nicholas Barry, Jr., present at the meeting was in position to follow in his father's footsteps, his father having been given extensions and then continued by special contract into his late 70ties and plaintiff believes into his 80ties which can be determined definitely at trial, as to the 80ties.

24. Plaintiff had been told while visiting in the New York branch of the office that one of the attorneys he met there in the Real Property Bureau had been given extensions to age 74 and was applying for further extension.

25. On the second extension, Plaintiff by virtue of having been given the above interview succeeded in getting a three months extension but on the subsequent third request for further extension he was given no extension, no hearing, no reason. His application had just been pocket vetoed with no one in position to declare the statute in question

and the aforesaid actions taken under color of the statute unconstitutional to override the veto except this Court. Plaintiff's employment thus ended on the close of March 31, 1974.

26. Subsequent to March 31, 1974 plaintiff tried to get an interview with the Attorney General but his request for such interview was denied.

27. Plaintiff further alleges that he followed up on his third request for continuance and had informed personnel in the Retirement office which is under Mr. Levitt's control that he was not consenting to involuntary mandatory retirement and was ready, able, willing and desirous of continuing in his tenured position and he also had personnel in that office make it clear to personnel in the Civil Service office with whom they were contacting that such was his position.

28. Plaintiff further alleges that the involuntary mandatory retirement has caused him loss of his livelihood and loss of association and status in the community and left him with no prospects of employment elsewhere as for ten years he had specialized in a particular restricted field and which are limited in number and in which plaintiff has not been able to find one and that in other fields the employers and employment agencies though very polite because of plaintiff's background point out the breaking in period so that plaintiff has not been successful in making new connections. The psychological problems are immense.

Causes of Action

First Cause of Action

29. For his first cause of action plaintiff realleges herein, by incorporation herein, the above allegations.

Second Cause of Action

30. Plaintiff repeats the allegations in the prior paragraphs.

31. Plaintiff alleges that the law in question—Section 70 of the New York State Retirement Act—is unconstitutional in that as above set forth it violates the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States that "No State shall make or enforce any law which shall abridge the Privileges or immunities of citizens of the United States" as this law does as to Plaintiff who is a citizen of the United States and this law abridges plaintiff's fundamental right to work by its terms and by the unconstitutional actions of the Attorney General under color of the said statute and under its unconstitutional delegation of unqualified discretion amounting to legislative power placed in an administrator.

Third Cause of Action

Unconstitutionality because of unreasonable arbitrary denial of a hearing before dismissal caused by the statute and unconstitutional actions under color of the statute.

32. Plaintiff repeats the allegations in the prior paragraphs.

33. Plaintiff further alleges that the law in question is unconstitutional in that as shown above it deprives plaintiff of and allows for plaintiff, as herein, to be deprived of his tenured Civil Service position without procedural due process by which he was deprived of his liberty, livelihood and property in violation of the provisions of Section One of the Fourteenth Amendment to the Constitu-

tion which states "nor shall any state deprive any person of life, liberty or property without due process of law" as plaintiff was deprived of his liberty and property as shown above.

Fourth Cause of Action

Unconstitutionality because of deprivation of liberty and property by setting up an arbitrary unreasonable irrebuttable presumption.

34. Plaintiff repeats the allegations in the prior paragraphs.

35. Plaintiff alleges that the law in question with its invited action by the Attorney General under color of the statute to unjustifiably arbitrarily act under an irrebuttable presumption that chronological age of seventy and over permitted the Attorney General to deprive plaintiff of his tenured position thus taking his property and liberty away without substantive due process, all as shown above, in violation of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States that "No State shall deprive any person of life, liberty or property without due process of law" as plaintiff was deprived of his liberty and property as shown above.

Fifth Cause of Action

Unconstitutionality because of Denial of Equal protection of the laws.

36. Plaintiff alleges that the statute in question and the actions of the Attorney General under color of said statute are both severally and jointly unconstitutional in that the statute and/or said actions along with those of the other defendants deprived plaintiff of the protection of

the prohibition set up in Section One of the Fourteenth Amendment of the Constitution of the United States that no State shall (nor omitted) "deny to any person within its jurisdiction the equal protection of the laws" in that the unbridled discretion vested in the Attorney General to force plaintiff without reason and arbitrarily into involuntary mandatory retirement thru impermissible discrimination as to him both as against those in the pre 70 group and as against those in the 70 and over group classifications to his injury as to his liberty and property and pursuit of happiness resulting in refusing him a continuance while granting same to other similarly situate without justifiable reason or authority for such discrimination.

Sixth Cause of Action

Unconstitutionality because of impermissible discrimination between the two classes set up and also discrimination among those in the over 70 classification.

37. Plaintiff alleges that the statute in question and the actions of the Attorney General under color of said statute are unconstitutional in that the statute sets up a classification as to those over 70 which discriminates as to employees reaching the age of 70 and over based on chronological age which has no basis for the achievement of a rational state program all in violations of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States that prohibits any state "to deny to any person within its jurisdiction the equal protection of the laws" in that in the solely mental work such as was assigned to plaintiff chronological age is no criterion for differentiation between those under seventy and those seventy and over and said statute is further

rendered unconstitutional by the delegation of nonaccountable despotic discretion in the Attorney General and those who may happen to be department heads without any safeguards to prevent abuse and unconstitutional action by such persons as herein.

Seventh Cause of Action

Unconstitutionality because of violation of fundamental rights based on arbitrary discrimination based solely on chronological age.

38. Plaintiff repeats the allegations in the prior paragraphs.

39. Plaintiff alleges that the statute in question is unconstitutional in that its discrimination is based solely on chronological age contrary to all the provisions in Section One of the Fourteenth Amendment to the Constitution of the United States in that it deprives citizens of their Privileges and Immunities and Due Process and Equal Protection in that arbitrarily and discriminatorily at the age of 78 no one is permitted to continue to work nor to continue in his job regardless of whether the individual is as fit mentally and physically and in all other respects as he ever was and such discrimination based solely on chronologically aged persons and solely on chronological age is as impermissible as discrimination based solely on religion, race, political views, alienage and sex in violation of the provisions of the Constitution of the United States wherein fundamental and constitutional rights are equally protected whether therein expressly or impliedly included such as the right to the pursuit of happiness set forth in the Declaration of Independence as a fundamental right and the right of a tenured Civil Service employee to be secure in his employment and look forward to such should be subject only to his retention of fitness and merit.

Eighth Cause of Action

Unconstitutionality because of state impairing the obligation of contracts.

40. Plaintiff repeats the allegations in the prior paragraphs.

41. Plaintiff alleges that the statute in question by its terms and the actions of the Attorney General under color of the Statute has impaired the obligation of plaintiff's contract in that under his Civil Service Tenure there is an implied contract with the state that he will be continued in employment so long as he remains fit and meritorious as plaintiff has so remained and that he will not be prejudiced because of his age and that the dismissal herein under the wording of the statute and the actions of the Attorney General under color of the statute have impaired this contractional relationship and deprived him of his tenured Civil Service position.

Ninth Cause of Action

42. Plaintiff alleges that the statute in question and the actions of the Attorney General thereunder violate the provisions of 42 U.S.C. 1985 as to conspiratorial actions, and violate the provisions of Section 10 of Article 1 as to Bills of Attainder and Cruel and unusual punishment both applicable to civil actions, all as above alleged.

WHEREFORE plaintiff prays that an order, judgment and decree be made and entered

(1) Declaring that the Statute in question, namely, Section 70 of the New York State Retirement and Social Security be declared unconstitutional as it now reads and as it has been applied and that the actions under color of the statute were unconstitutional, and

(2) Declaring that there was no legal separation of Plaintiff from his position as Senior Attorney-Realty in the Real Property Bureau of the New York State Law Department and that Defendants are enjoined from continuing to enforce the statute and the separation and enjoining them from refraining to set a reasonable date for plaintiff to return to carry on his work with reasonable notice to plaintiff of said date and that Defendants are to arrange for payment to plaintiff of a sum equal to the wages he would have received from March 31, 1974 to the date set for return and that said sum is to be paid to plaintiff prior to said date set for return with any accrued interest and that the records be set to record that there was no legal breach of continuity so that plaintiff will lose no fringe or other benefits which would have accrued and so that any future pension benefits will not be lessened by the enforced layoff, and

(3) Declaring that a permanent injunction issue to effectuate the above,

(4) That Plaintiff be granted costs and attorney's fees, and

(5) That Plaintiff be granted such other, further and different relief as may be just and proper.

Dated: New York, N.Y.
March 31, 1977.

CAROL C. JOHNSON
Attorney for Plaintiff
600 West 111th St.
New York, N.Y. 10025

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

CAROL C. JOHNSON, plaintiff herein, being duly sworn deposes and says: deponent is the plaintiff herein in the above action; deponent has read the foregoing complaint and knows the contents thereof; and the same is true to deponent's own knowledge.

/s/ CAROL C. JOHNSON
Carol C. Johnson

Sworn to before me on this
31st day of March, 1977

/s/ MORRIS S. WYLIE
Morris S. Wylie
Notary Public, State of New York
No. 41-9757950
Qualified in Queens County
Term Expires March 30, 1978
(Notary Public Seal)

REASONS FOR GRANTING THE WRIT

Reasons to Grant Certiorari

I. The Decision of the Second Circuit Court herein conflicts with the Decision of the Seventh Circuit Court as to the Constitutionality of Mandatory Retirement Acts such as the one herein.

II. The Decision below raises significant and recurring problems concerning the application of the Constitution to Mandatory Retirement Acts.

III. The Decision affects the lives of some 20,000,000 citizens over 65 and their dependents.

IV. Congress has now definitely determined to prohibit Involuntary Mandatory Retirement of Federal Employees. The bill awaits the signature of the President of the United States.

Re: The Four Cases Cited in the District Court's Decision.

1. *Weisbrod* v. *Lynn,* 383 Fed. Supp. 933 (D. D.C. 1974) summarily affirmed without a hearing in the Supreme Court 420 U.S. (1975).

   In the Weisbrod case the dismissed employee of HUD was immediately rehired as an annuitant at the same salary.

   Later in the Murgia case the Supreme Court referring to the Weisbrod case and two others stated that "Our cursory consideration" in those cases does not, of course, foreclose the opportunity to consider more fully that question.

   That the dismissed employee had been immediately rehired may have been the reason for simply a summary affirmance.

2. *Rubino* v. *Ghezzi,* 512 F.2d 431, *cert. denied,* 423 U.S. 891.

3. *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307.

4. *McIlvaine* v. *Pennsylvania State Police,* 415 U.S. 986.

The Rubino case was under a retirement statute tailored and limited to Judges. The Murgia and McIlvaine cases were respectively tailored and limited to police officers.

Mr. Justice Marshall in the Murgia case made the following statement that can be applied to the three last men-

tioned cases and which differentiated in principle these cases from the case at bar where the Retirement Statute covers many categories of workers and work:

> "The Court's conclusion today does not imply that all mandatory retirement laws are constitutionally valid. Here the primary state interest is in maintaining a physically fit police force, not a mentally alert or manually dextrous workforce. That the Court concludes it is rational to legislate on the assumption that physical strength and well-being decrease significantly with age does not imply that it will reach the same conclusion with respect to legislation based on assumptions about mental or manual ability. Accordingly, a mandatory retirement law for all government employees would stand in a posture different from the law before us today."

Such a mandatory retirement law is now before this Court.

CONCLUSION

For the foregoing reasons it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

CAROL C. JOHNSON
Attorney for Petitioner
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APPENDIX

Appendix A

Opinion of Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 381—September Term, 1977.

(Argued December 5, 1977 Decided December 14, 1977.)

Docket No. 77-7282

CAROL C. JOHNSON,

Plaintiff-Appellant,

v.

LOUIS J. LEFKOWITZ, individually and as New York State Attorney General and as head of the New York State Law Department which contains the Real Property Bureau and VICTOR S. BAHOU, ERSE H. POSTON and JOSEPHINE L. GAMBINO, as respectively, President, Member and Member of the New York State Civil Service Commission and ARTHUR LEVITT, as New York State Comptroller who as such is Administrative Head of the New York State Employee's Retirement System,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
ANDERSON and TIMBERS, *Circuit Judges.*

Appeal from an order, entered May 16, 1977, in the United States District Court for the Southern District of New York, Goettel, *J.*, dismissing appellant's *pro se* action which sought, *inter alia*, a declaration that Section 70

of the New York Retirement and Social Security Law is unconstitutional on its face and as applied.

Affirmed.

CAROL C. JOHNSON, New York, New York, *pro se*, *for Plaintiff-Appellant.*

LILLIAN Z. COHEN, Assistant Attorney General, State of New York, and Samuel Hirshowitz, First Assistant Attorney General, of counsel), *for Defendants-Appellees.*

KAUFMAN, *Chief Judge:*

This appeal brings into question the constitutionality of §70 of the New York State Retirement and Social Security Law which provides for the mandatory retirement of tenured civil service employees at age 70. Carol Johnson, whose position as Senior Attorney in the State Real Property Bureau was terminated pursuant to that provision, seeks its invalidation, claiming that, on its face and as applied, §70 contravenes the due process and equal protection clauses. We are convinced, however, that the retirement provisions are a reasonable expression of state policy and clearly meet constitutional standards. Accordingly, we affirm Judge Goettel's dismissal of Johnson's complaint.

I.

Johnson's involvement with the New York State civil service began in 1962, when he first applied for the position of Senior Attorney—Realty in the Real Property Bureau of the New York State Law Department. Following his successful completion of the required competitive civil service examination, Johnson was interviewed for

and given the post. He reported for work on January 10, 1963 and, according to his complaint, his primary duties consisted of reading title abstracts to determine the ownership of property taken by the State for roadways, parks and recreation centers. Johnson remained in this position for over ten years, and his performance was satisfactory throughout. In fact, when he again took the civil service examination in 1968 to qualify for a transfer from Albany to New York City, he received a perfect score.

On June 21, 1973, Johnson turned seventy. He was then informed that, pursuant to §70 of the Retirement Law,[1] he would be mandatorily retired at the end of the month. In pertinent part, §70 provides that:

> Any member who attains age seventy shall be retired on the first day of the calendar month next succeeding such event . . . .

---

1 Section 70

"(b) Any member who attains age seventy shall be retired on the first day of the calendar month next succeeding such event. . . .

(c) Notwithstanding the provision of subdivision b of this section, the state civil service commission may approve the continuance in service of members who have attained age seventy. Such approvals shall be for periods not to exceed two years each. No such approval shall be given unless:

1. The head of the department in which the member is employed shall file a written statement with the comptroller approving such continuance, and
2. The medical board shall certify that such member is physically fit to perform the duties of his position, and
3. The state civil service commission shall find that:

(a) Such member is less than seventy-eight years of age, and

(b) His continuance in service would be advantageous because of his expert knowledge and special qualifications.

The service of any such member may, however, be terminated at any time by the head of the department in which he is employed, upon sixty days written notice to such member".

§70(c) further qualifies this provision by authorizing the State Civil Service Commission to "continue" an employee until the age of 78 in incremental periods not to exceed two years. To be eligible for such an extension, the civil servant must receive the approval of the head of his department, be certified as fit, and demonstrate that his retention in service would be advantageous because of his expert knowledge and special qualifications. The employment under §70(c) of any retired member may be terminated upon sixty days notice.

Pursuant to the provisions of §70(c), Johnson successfully applied for two extensions, and was granted continuances of, respectively, six and three months. His efforts at obtaining a third were unavailing, however, and his employment was terminated on March 31, 1974.

Exactly three years later, on March 31, 1977, Johnson commenced this action seeking a declaration that §70 is unconstitutional on its face and as applied. Johnson's complaint alleged, in exhaustive fashion, that the statutory provision abridges the fundamental right to work; permits the termination of a tenured employee without procedural due process; creates an irrebuttable presumption based upon age; results in a denial of equal protection; impairs the contractual relationship of tenured civil service employees; constitutes cruel and unusual punishment; and permits an unconstitutional delegation of authority to those who must administer it. Johnson also claimed that the action of the Attorney General in refusing to grant him a further extension of his employment was arbitrary, and contrary to the spirit of §70(c). Beyond a declaration of his rights, Johnson sought an order reinstating him to his position, awarding him back pay and other accrued benefits.

The State moved to dismiss the complaint and, on May 16, 1977, Judge Goettel granted its motion. He held that the counts alleging constitional violations failed to state

claims upon which relief could be granted, and that the remaining counts, attacking the Attorney General's refusal to continue Johnson in service, did not constitute issues conferring federal jurisdiction. This appeal followed.

II.

At the heart of Johnson's complaint is his claim that §70 violates the equal protection clause and creates an impermissible, irrebuttable presumption. Yet, these very contentions have been rejected in a variety of contexts by virtually every court considering them, including the Supreme Court and this court. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (mandatory retirement of state police officers at age fifty); *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974) (mandatory retirement of state police officers at age sixty); *Rubino* v. *Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, 423 U.S. 891 (1975) (mandatory retirement of state court judges at age 70); *Weissbrod* v. *Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd* 420 U.S. 940 (1975) (mandatory retirement of federal civil service employees at age seventy).

These cases uniformly instruct that age is not a suspect classification requiring strict scrutiny of the state's scheme of age restrictions. See also *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973). And, in addition, they clearly establish that the Constitution does not afford any individual a protected right to public employment. See also *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Accordingly, the state need not articulate a rational basis for its statutory scheme. It would appear without question that §70 is reasonably related to legitimate state interests in efficiency and economy. A mandatory retirement policy allows department heads to plan the training and advance-

ment of their employees, and motivates young workers to acquit themselves well and to progress through the ranks. And the statute before us, which permits some employees to continue in their jobs until the age of 78, serves these legitimate state purposes without needless prejudice to the greater number of qualified employees.

Johnson's argument that §70 establishes an irrebuttable presumption is substantially the same as his equal protection claim. Moreover, it is now clear that the applicability of the so-called irrebuttable presumption doctrine is limited to those cases involving suspect classifications. *See Frontiero* v. *Richardson*, 411 U.S. 677 (1973); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974).[2]

Apart from his substantive attacks on the retirement provision,[3] Johnson alleges that he was deprived of his tenured civil service position without procedural due process. He claims that he was entitled to a hearing either at the time of his mandatory retirement or at the time his final extension was refused. Appellee suggests that Johnson's due process argument is wholly misguided since his termination affected neither a protected property or liberty interest. We need not, however, reach the state's argument. Assuming *arguendo* that Johnson's dismissal affected his property or liberty, a determination of constitutionally

2 Johnson also makes the ancillary claim that he has been denied equal protection vis-à-vis those individuals over the age of seventy whose service has been continued pursuant to the statute. The status of those employees, however, is not based upon a classification established by the State, but upon case-by-case determinations made by agency heads.

3 Johnson's claim that the statute constitutes cruel and unusual punishment is frivolous. It is clear that such a contention has no place in the context of a civil proceeding. *Ingraham* v. *Wright*, 430 U.S. 651 (1977).

Equally frivolous is his assertion that §70(c) permits an unconstitutional delegation to those who must administer it. The statute, however, does not confer arbitrary discretion. It contains sufficiently defined standards to guide administrators in the exercise of their duties.

mandated procedures requires that the interests of the individual in being afforded such safeguards be balanced against the burden to the state in conducting them. It is clear to us that the administrative cost to the state of providing each retiree with a hearing would be enormous, and by far outweigh the hardship to the individual.

Finally, Johnson claims that the action of the Attorney General in refusing to recommend his continuance was arbitrary and contrary to the spirit of §70. This contention raises a question of state law which could have been reviewed in the state courts by way of an Article 78 proceeding. *Powell* v. *Workmen's Compensation Board*, 327 F.2d 131, 137 (2d Cir. 1964). Such a claim, simply enough, does not confer federal jurisdiction.

In upholding the constitutionality of §70, we recognize that there are many individuals who wish to continue in their positions past the age of 70—perhaps, beyond the age of 78. The New York State Retirement Law, however, evidences a legislative weighing of the desire of older employees to retain their jobs against the interests of efficiency and economy in the civil service. We cannot say that the balance struck by the legislature is a constitutionally impermissible one. Accordingly, we affirm.

Appendix B

Opinion of District Court for the Southern District of New York

ENDORSEMENT

Carol C. Johnson v. *Louis J. Lefkowitz, etc. et al.*, 77 Civ. 1547 (GLG) (Pro Se)

For reasons stated in open court on argument of the motion, the motion to dismiss the complaint is granted.

The case of *Weissbrod* v. *Lynn*, 383 F. Supp. 933 (D. D.C. 1974), *aff'd*, 420 U.S. 940 (1975) appears directly in point in its attempt to attack the mandatory retirement age for federal civil service. A similar result was reached in this circuit in *Rubino* v. *Ghezzi*, 512 F.2d 431 (2d Cir. 1975), *cert. denied*, 423 U.S. 891 (1975), concerning mandatory retirement of state court judges. The Supreme Court has rejected most of the arguments set forth by the plaintiff in the case of *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) and *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974).

The only issue not disposed of by the above authorities is the claim that the Attorney General of New York acted arbitrarily in exercising his discretion in refusing to grant the plaintiff a third extension of his retirement date. The statutory structure, New York Retirement & Social Security Law, Section 70, makes it apparent that continuance in service after age seventy is entirely discretionary, with the limitation that the discretion may not be exercised unless the employee meets certain requirements. This does not mean, as argued by the plaintiff, that he is automatically entitled to two-year renewals until age seventy-eight, if he meets the necessary standards.

With respect to the argument that there has been an arbitrary abuse of discretion, this is a matter properly

pursued under the New York State remedies and does not constitute a constitutional question or one conferring federal jurisdiction. Consequently, the motion to dismiss must be granted.

So Ordered:

Dated: New York, N.Y.,
May 16, 1977.

Gerald L. Goettel
U.S.D.J.

Appendix C

Opinion of Court of Appeals, Seventh Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 74-1579

JULIA GAULT, individually and on behalf of
of all others similarly situated,

Plaintiff-Appellant,

v.

JAMES E. GARRISON, President, Board of Education,
School District 215, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 74 C 931—Frank J. McGarr, *Judge*

DECIDED DECEMBER 20, 1977

Before:

BARNES, *Senior Circuit Judge,*[1]
SWYGERT and PELL, *Circuit Judges.*

[1] The Honorable Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit is sitting by designation.

SWYGERT, *Circuit Judge:*

Julia Gault, on behalf of herself and others similarly situated, filed suit under 42 U.S.C. § 1983 challenging the constitutionality of governmental mandatory retirement requirements. Plaintiff contends that defendant school board's policy of forced retirement is unconstitutional as violative of both equal protection (by discriminating against plaintiff on the basis of age) and due process (by creating an irrebuttable presumption and by terminating public employment arbitrarily). Shortly after the complaint was filed, the district court granted defendants' motion to dismiss and plaintiff appealed.[2]

After oral argument was heard, this court issued an order staying the appeal pending a ruling in *Massachusetts Board of Retirement* v. *Murgia,* 376 F. Supp. 753 (D. Mass. 1974), *prob. juris. noted,* 421 U.S. 974 (1975). *See* 523 F.2d 205 (7th Cir. 1975). Following the decision in *Murgia,* 427 U.S. 307 (1976), we ordered the parties to file supplemental briefs. We now treat the constitutional issues raised by plaintiff and, and the reasons stated below, reverse the order of the district court.

I

Although the facts were stated in our previous opinion, a brief resume may be helpful. Upon reaching the age of 65, plaintiff, a tenured biology teacher at Thornton Fractional Township South High School, located in Cook County, Illinois, was informed by the district school board that she would have to retire at the end of the academic year.

[2] This case, though filed as a class action, was dismissed before the question of class certification was reached.

The Illinois School Code of 1961, as amended, Chapter 122 of the Illinois Revised Statutes, does not require the retirement of teachers at any age. It does provide, however, that the tenure of public school teachers shall end at age 65 and that any subsequent employment shall be on an annual basis. Ill. Rev. Stat. ch. 122, § 24-11. Furthermore, the School Code does not afford teachers over 65 the extensive procedures which a school board must follow to dismiss or remove a teacher.[3] *Id.* at § 24-12.

This statutory scheme is supplemented by defendant school board's policy which states that "a teacher who reaches the age of sixty-five before the end of a school year shall retire on that date following his 65th birthday. . . ." Policy No. 4146. This policy thereby goes a step further than the School Code and removes all teachers over 65 under the board's jurisdiction from any consideration for this annual retention. It was pursuant to this policy to which plaintiff was terminated.

II

Plaintiff contends that the board policy of compulsory retirement violates her equal protection rights both substantively and procedurally: first, by requiring those over 65 years of age to retire, and second, by denying those over 65 those procedures granted to any other teacher upon termination. We note at the outset that this case does not involve a claim of a right to government employ-

[3] This procedure for dismissing or removing a teacher includes a hearing, written notice of charges, a bill of particulars, representation by counsel, cross-examination of witnesses, maintenance of a record of the proceedings, and a decision by majority vote of all members of the board. Ill. Rev. Stat. ch. 122, § 24-12. None of these protections were afforded plaintiff as she was over 65.

ment, but rather concerns only the access to continued eligibility for such employment.

Our first task in assessing an equal protection claim is to determine the proper standard of judicial review. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 253 (1974). The Supreme Court has employed at least two standards of review: the traditional rational basis test wherein classifications are constitutional if they bear a rational relationship to a permissible state interest, *Dandridge* v. *Williams*, 397 U.S. 471, 485-86 (1970), and the standard of strict judicial scrutiny wherein classifications are constitutional only if they are necessary to promote a compelling state interest. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Tompson*, 394 U.S. 618 (1969). The latter, more rigid, test is applied when reviewing state-created classifications which interfere with the exercise of a fundamental right or involve a suspect classification. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973).

Which standard to apply in determining whether a compulsory retirement provision denies equal protection was answered in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). The Court in that case held that the right of governmental employment is not fundamental and that age does not constitute a suspect class. *Id.* at 313-14. Accordingly, the Supreme Court held the standard of strict scrutiny inappropriate and examined the mandatory retirement statute under the traditional rational basis test. Our inquiry in this case, therefore, is directed to ascertain whether the articulated state interest is legitimate and whether the age 65 classification for the retirement of school teachers is rationally related to furtherance of that state interest.[4]

[4] Plaintiff urges this court to apply an intermediate or third equal protection test, wherein the challenged law must bear a

In *Murgia* a uniformed state policeman challenged a state statute which formed him to retire at age 50. The Court observed that the purpose identified by the state was a desire "to protect the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314. The record included testimony presented to the trial court pertaining to the rigors and demands of uniformed police activities as well as medical testimony concerning the relationship of age to the ability to perform those functions. Based upon this evidence, the Court concluded that a clear rational relationship existed between the classification and its articulated purpose. *Id.* at 315.

In following the Supreme Court's analysis, we look first for an identifiable state purpose in the statutory termination of tenure and the local board's mandatory retirement of schoolteachers at age 65. Because this case was dismissed shortly after the complaint was filed, no evidence has been presented and no affidavits have been filed; the court did permit plaintiff to file an "offer of proof." [5] The defendants have not identified the purpose of the requirements in question; their briefs only hint that the purpose

"substantial relation" to the purpose it seeks to accomplish. The Supreme Court seems to have used such a test in the areas of discrimination based on sex and illegitimacy. *See, e.g., Trimble* v. *Gordon*, 430 U.S. 762 (1977); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Mathews* v. *Lucas*, 427 U.S. 495 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971). We are compelled to decline plaintiff's invitation as *Murgia* is clearly dispositive in this regard.

[5] A hearing on defendants' motion to dismiss was set for May 17, 1974. On May 16, however, the district court advised plaintiff's attorney not to bring to the courtroom the witnesses scheduled to testify on her behalf. The next day, the district court announced from the bench its ruling granting the motion to dismiss. Following this announcement, the court granted leave to plaintiff to submit an offer of proof summarizing the evidence which would have been presented had the hearing gone forward. On May 22 the district court issued its memorandum opinion and order.

may be to remove unfit teachers. In *Murgia,* the Court called upon "the purpose identified by the State" as that to which the age classification must bear a rational relationship. Without such a purpose demonstrated in the instant case, we cannot, absent further proceedings, justify the challenged provisions.

Even if we could assume that the purpose of these provisions is to prevent the retention of unfit teachers, the requirements must fall. Again, unlike the situation in *Murgia,* there has been no evidence presented to indicate any relationship between the attainment of the age of 65 and a schoolteacher's fitness to teach. The physical demands of teaching do not even begin to approach those found by the Supreme Court, upon credible evidence, to be critical to the performance of uniformed state police duties. No evidentiary proof is necessary to note that teaching is a profession in which mental skills are vastly more important than physical ability. We cannot assume that a teacher's mental facilities diminish at age 65. On the contrary, as suggested by plaintiff's offer of proof, much in the way of knowledge and experience, so helpful to the educational profession, is often gained through years of practice.

Another distinction must be drawn between this case and *Murgia.* Because of the nature of the duties required of the policemen in the latter case and the imminent possibility of unfitness shown to be related to advancing age, failure to perform properly in any given instance could become a matter of life or death. In contrast, if a teacher becomes unfit, whether because of age or other factors, it does not become a matter of such immediacy that there is not time or opportunity to take appropriate procedural steps for his or her removal. By using the procedures normally taken for the removal of a teacher alleged to be

unfit, there is greater guarantee that unfit teachers will be removed while the rest will be able to continuing performing their jobs, putting to use the experience and knowledge gained over the years.

It is no answer to say that a state "does not violate the Equal Protection Clause merely because the classification made by its law are imperfect," *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970), when these classifications cannot be shown to be even rationally related to the objective the state is attempting to achieve (still assuming *arguendo* such an objective can be shown by the defendants). In *Murgia*, the Court found no indication that the mandatory retirement provision had "the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." 427 U.S. at 316. Unlike the Court in *Murgia*, we cannot say that the provisions in the instant case would eliminate any more unfit teachers (assuming again that such is the purpose) than a provision to fire all teachers whose hair turns gray.

The decision in *Murgia* was based upon an evidentiary record showing the state's purpose and how the challenged legislation related to that purpose. Here, there is no record. We cannot uphold as constitutionally valid a classification of public schoolteachers based upon age without a showing that it rationally furthers some identifiable and articulable state purpose.

III

Plaintiff's equal protection claim has yet another aspect. She contends that the lack of any procedure in both the automatic termination of her tenure and her mandatory retirement resulted in treatment unequal to that given to any other teacher who is released. Both tenured and probationary teachers under age 65 are guaranteed procedural safeguards prior to any termination. This situation is similar to that in a recent case decided by this court. In *Miller* v. *Carter*, 547 F.2d 1314 (7th Cir.), *cert. granted*, 45 U.S.L.W. 3690 (April 18, 1977), we sustained a constitutional challenge to a City of Chicago ordinance which barred persons convicted of certain crimes from obtaining a public chauffeur's license. The ordinance further provided that a person to whom a license had been issued might have his license revoked after conviction of such an offense; however, revocation was not automatic but was subject to administrative discretion. Thus the ordinance created two classes receiving unequal treatment, the distinguishing fact being whether a person was in possession of the license at the time of his conviction, although the members of both classes were similarly situated in that the type of crime was identical. We found this to be an irrational distinction and held it violative of equal protection.

Here, as in *Miller*, the classification of teachers between those who are afforded and those who are not afforded procedural safeguards before their removal on its face discriminates against persons who are similarly situated. Accordingly, we cannot sanction the total lack of procedural equality suffered by teachers who have reached the age of 65 without a record showing the presence or absence of a justifiable and rational state purpose.

Because plaintiff's complaint states a claim that her rights under the Fourteenth Amendment have been violated, the order dismissing the complaint is reversed and the cause is remanded for further proceedings consistent with this opinion.

BARNES, *Senior Circuit Judge*, concurring:

Strict scrutiny is not the proper test for determining whether a mandatory retirement provision denies appellee equal protection, because strict scrutiny of a legislative classification is required only when the classification impermissibly interferes with the exercise of a fundamental right (cases cited in *Murgia*, Note 3), or operates to the peculiar disadvantage of a suspect class (cases cited in *Murgia*, Note 4). If mandatory retirement for a fireman at age 50 does not interfere with the exercise of his fundamental right neither will mandatory retirement interfere with the desire or right of a teacher to teach at age 65. Nor is a teacher within a suspect class. Appellant here has no fundamental right to teach, either at 65, or at any other age. Cf. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973). Here we must examine the state's classification under the less strict rational-basis standard. To paraphrase *Murgia*, "Since physical ability generally declines with age, mandatory retirement at 65 serves to remove from teaching those whose fitness for work presumptively has diminished with age. This clearly is rationally related to the state's objective."

Whether 65 or 60 or 70 is a proper age for teacher retirement is not here our concern. Imperfect classifications made by legislative bodies are not rendered unlawful by their imperfections. *Dandridge* v. *Williams*, 397 U.S. at 485, cited in *Murgia*, p. 316-17.

But to apply these principles to the facts of this case is impossible, because no evidence has been presented at any time (as Judge Swygert's opinion points out), and we have no factual basis upon which to judge the issues or to apply the law.

I concur in Judge Swygert's opinion.

PELL, *Circuit Judge*, dissenting:

The majority opinion draws distinctions found to be persuasively supporting the result reached in the opinion between the present case and *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); however, a fundamental distinction between the two cases appears to be ignored. Because it is a significant distinction in my mind, and for other reasons set out herein, I respectfully dissent.

Murgia drew the line for compulsory retirement at the age of 50, "a certain age in middle life," *id.* at 313. While for personal reasons, as well as documented studies, I would be hesitant to say that the person who has reached 65 years of age is necessarily elderly either physically or mentally, I also think as a matter of law that that age was so well established at the pertinent time as a point at which retirement age was reached that if it is to be changed, the change should be accomplished by the legislative branch and not by judicial action purportedly under the Constitution.

In 1967, the Congress, being aware that approximately half of the states had enacted age discrimination legislation, 1967 U.S. Code Cong. & Admin. News 2215, enacted P.L. 30-302, sometimes referred to as the Age Discrimination in Employment Act of 1967. In House Report No. 805 on the pending legislation it was stated that "the bill outlines a national policy against discrimination in employment on account of age, provides a vehicle for enforcement of the policy, and establishes broad general guidelines for its implementation." 1967 U.S. Code Cong. & Admin. News 2220. That national policy insofar as age limitations were concerned was stated to be "individuals who are at least forty years of age but less than sixty-five years of age." 29 U.S.C. § 631. In the statute itself the Congress stated that the Act's purpose was, *inter alia*,

"to promote employment of older persons based on their ability rather than age"; and "to prohibit arbitrary age discrimination in employment . . ." 29 U.S.C. § 621(b). It appears plain that the Congress by so stating the policy did not regard discontinuance of employment beyond the age of 65 to be age discrimination of an arbitrary nature. Indeed, House Report No. 805 indicates that the major concern was not with the 65 year age standard but with the lower limit, which had been lowered from 45 in the original bill, with argument being considered that in some occupations age discrimination could be found at a lower point. *Id.* at 2219.

That a legislative enactment establishes national guidelines does not, of course, necessarily import constitutionality into those guidelines. Nevertheless, when those guidelines are an interwoven part of a broader pattern, as is obviously the situation in this country, of pension and retirement plans and social security statutes, the courts, it appears to me, should be extremely reluctant to tamper with one part of the broad social scheme.

The Supreme Court has told us in *Murgia*, dealing with compulsory retirement of state police officers at the age of 50, that such action by a legislature is presumed to be valid, and that the judicial inquiry must employ a relatively relaxed rational-basis standard reflecting judicial "awareness that the drawing of lines that create distinctions is peculiarly a legislative task." 427 U.S. at 314. This approach to a "middle life" compulsory retirement age directed at one specific occupation suggests that our examination of a compulsory retirement procedure involving a significantly higher age maximum not only applicable to the particular occupation but one generally applicable, and generally deemed appropriate, should be on

an *a fortiori* basis insofar as the relativity of the relaxed rational-basis standard is concerned.

The significance of a higher age equation with the propriety of mandatory retirement was implicitly recognized in the *Murgia* district court opinion by the following observation of Judge Aldrich:

> [W]e would anticipate the question of mandatory retirement at age 70 not to be the same as at age 50, but perhaps we say this because of the increasing difficulties that a plaintiff might have to show that at that greater age the state had not made out a factually rational argument.

Murgia v. *Commonwealth of Massachusetts Board of Retirement*, 376 F. Supp. 753, 756 n.9 (D. Mass. 1974).

In any event, just as the courts should dispose of cases if possible on grounds other than by reaching constitutional issues, the courts should also, it seems to me, where the federal legislative picture demonstrates an alertness to and an orderly resolution of a complex societal problem, exercise restraint in intervening under the constitutional cloak in the developmental process on what could only be a piecemeal basis.

In the present context, Congressional concern and continuing interest is clear. In the original Act, the Secretary of Labor was charged with undertaking an education and research program and was specifically directed to recommend to Congress any measures he deemed desirable to change the lower or upper age limits. 29 U.S.C. § 622. While employers were not prevented by the Act from taking action otherwise prohibited where age is a bona fide occupational qualification reasonably necessary to the operation of a particular business, or where differentiation

is based on reasonable factors other than age, or where there is observance of the terms of seniority systems or pension and similar plans which are not subterfuges to evade the purposes of the Act, or where there is discharge for good cause, § 623(f), the Act makes age itself within the Act's limits an unlawful basis for discrimination. § 623(a). In the 1974 amendments, it was provided that the definition of an employer included "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State". 29 U.S.C. § 630(b).

Currently, we find that the legislative process is an unintermitted one. Both the House and Senate have passed amendatory versions which are now in conference committee, the conferees having been appointed late in October of 1977. It, *inter alia,* has been agreed by both houses that the maximum age limit shall be 70 rather than 65. *See* CCH Lab.L.Rep., Employment Practices, Rep. 30, October 20, 1977.

The comprehensive legislative scheme as it continues to develop will not, of course, mean, as it does not now, that every employee in every occupation is automatically entitled to stay on to the maximum age limitation. This, obviously, is on the assumption that legislation in the future will continue to recognize § 623(f) factors permitting under-maximum-age employment termination such as good cause discharge, necessary occupational qualification, and bona fide, non-subterfuge employee benefit plans. The maximum age, however, as it is established from time to time in the public interest appears to me in and of itself to import rationality and to preclude challenge by those exceeding the maximum.

Turning to the particular case before us, it is noted that the Illinois Age Discrimination Act, as contrasted

to the federal statute and most state statutes, does not on its face specify a maximum age. *Kennedy* v. *Community School District No. 7, Champaign County,* 23 Ill. App.3d 382, 319 N.E.2d 243, 246-47 (1974). The court in *Kennedy,* however, rejected a challenge to age 65 retirement by a teacher not only on due process and equal protection grounds but also under the Illinois Age Discrimination Act pointing out that under that legislation, similarly to the federal act, it was not intended to interfere with the operation of non-subterfuge annuity and pension plans. "The long existence of the statutory system of annuities and pensions and its general application to teachers throughout the State demonstrate that the 'retirement system' is not a subterfuge to evade the Age Discrimination Act." 319 N.E.2d at 247.

In the case before us, there is not only the rational relationship between the plaintiff's employment status and a non-subterfuge employee benefit plan but also she had gone beyond the maximum age so specified as a matter of national policy at the time of her termination, even though at the time state employees were not included within the federal statutory coverage.

Further, under the relaxed *Murgia* standard which would be applicable to a person past 65, it appears to me, although it was not expressly articulated by the defense, that the age 65 classification, aside from any aspect of declining physical or mental vigor, rationally furthers an educational purpose of the state. It is common knowledge that there is a growing surplus of teachers with the forecast that this surplus will continue to grow in size with many recent graduates majoring in education being unable to find employment. With the lifting of compulsory retirement and the continuing in employment of teachers who otherwise would have retired, it is reason-

ably foreseeable that those pursuing higher education will turn to other lines of endeavor with the result that when sheer physical or mental disability, or death, thins the ranks there will not be quantitative, and possibly qualitative, replacements.

I would hold therefore that the plaintiff has failed to demonstrate an infringement of her constitutional equal protection rights. She also has raised on this appeal a claim of due process violation, both procedural and substantive. I discern no merit in this attack. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sinderman*, 408 U.S. 593 (1972); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix D

Constitutional and Statutory Provisions Involved

28 U.S.C. § 1331 Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343. Civil rights and elective franchise.— The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. (June 25,

1948, c. 646, § 1, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, P.L. 85-315, Part III, § 121, 71 Stat. 637.)

42 U.S.C. § 1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985 Conspiracy to interfere with civil rights.

• • •

3. If two or more persons in any State or Territory conspire • • • for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

• • •

in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1444

CAROL C. JOHNSON,

Petitioner,

against

LOUIS J. LEFKOWITZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 566 F. 2d 866. The opinion of the District Court has not been reported to date. Copies of the opinions are annexed to the petition.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals for the Second Circuit correctly hold that Section 70 of the New York Retirement and Social Security Law, which provides for mandatory retirement of members of the state employees' retirement system at the age of 70, is constitutional?

Facts

Petitioner, a tenured employee in the state civil service system, was mandatorily retired from his position as an attorney in the New York State Department of Law when he reached the age of 70. His retirement was pursuant to New York Retirement and Social Security Law, Section 70. Thereafter he was granted two extensions of his employment pursuant to Section 70(c). His efforts to obtain a third extension were unsuccessful and, accordingly, his employment was terminated on March 31, 1974.

Exactly three years later, on March 31, 1977, petitioner commenced an action in the District Court seeking, among other relief, a declaration that Section 70 is unconstitutional on its face and as applied. In addition, he sought an order reinstating him to his position, awarding him back pay and otherwise restoring his rights to benefits which would have accrued since the termination of his employment.

The District Court Opinion

On May 16, 1977, the District Court granted respondents' motion to dismiss the complaint which had been made on the grounds that (a) the Court lacked jurisdiction over the subject matter and (b) the complaint failed to state a claim upon which relief could be granted. In rejecting petitioner's attack on the constitutionality of the statute, the Court

cited a series of decisions, including several in this Court, which had upheld the constitutionality of a variety of mandatory retirement statutes in the face of arguments similar to those made by petitioner. The Court then held that petitioner's claim that he was arbitrarily refused an extension did "not constitute a constitutional question or one conferring federal jurisdiction". The Court noted however that, contrary to petitioner's assumption, he was not automatically entitled to an extension simply because he met certain of the statute's requirements.

The Opinion of the Court of Appeals

On December 14, 1977, the Court of Appeals for the Second Circuit affirmed the decision of the District Court dismissing petitioner's complaint. The Court was "convinced . . . that the retirement provisions [contained in § 70] are a reasonable expression of state policy and clearly meet constitutional standards." *Johnson* v. *Lefkowitz*, 566 F.2d 866, 867 (2d Cir. 1977).

In rejecting petitioner's claims that § 70 violates the equal protection clause and creates an irrebuttable presumption, the Court pointed out that strict scrutiny of the statute was not required since age is not a suspect classification. Moreover, petitioner does not have a constitutionally protected right to public employment. The Court then found that

> "Without question . . . § 70 is reasonably related to legitimate state interests in efficiency and economy. A mandatory retirement policy allows department heads to plan the training and advancement of their employees, and motivates young workers to acquit themselves well and to progress through the ranks. And the statute before us, which permits some employees to continue in their jobs until the age of 78, serves these legitimate state purposes without needless prejudice to

the greater number of qualified employees." 566 F.2d at 869.

The Court rejected petitioner's contention that termination under the statute violated his right to procedural due process without deciding whether such a dismissal affected petitioner's right to liberty or property. In the Court's view, the interest of each retiree in having a due process hearing was far outweighed by the enormous administrative cost to the state in conducting them.

The Court dismissed as frivolous arguments by petitioner that § 70 constitutes cruel and unusual punishment and results in an unconstitutional delegation of discretion.

Finally, the Court concluded that insofar as petitioner challenged the way in which the statute had been applied in his case, the question was simply one of state law and did not confer federal jurisdiction.

Statute Involved

Section 70. Retirement and Social Security:

• • •

"b. Any member who attains age seventy shall be retired on the first day of the calendar month next succeeding such event. Such retirement shall be on the basis of 'Option One-half', unless the member files an effective election pursuant to section ninety of this article to retire on a different basis. If he shall have filed such an election, his retirement allowance shall be computed in accordance with the basis so selected by him. The provisions of this subdivision with respect to mandatory retirement shall be inapplicable to:

1. An elective officer.
2. A judge.
3. A justice.

4. An official referee.
5. A person holding office by virtue of an appointment to fill a vacancy in an elective office.
6. An employee of the port of New York authority.
7. A person who last became a member before April eleventh, nineteen hundred forty-five, and who serves continuously after such date in one or more of the following capacities:
   (a) A clerk of a court, as provided in the constitution, article six, section twenty-one.
   (b) An appointee of the governor.
   (c) An employee of the legislature drawing an annual salary, or
   (d) A chaplain of a county penal institution having served as such chaplain for not less than thirty years, or
8. A commissioner of elections.

(c) Notwithstanding the provision of subdivision b of this section, the state civil service commission may approve the continuance in service of members who have attained age seventy. Such approvals shall be for periods not to exceed two years each. No such approval shall be given unless:

1. The head of the department in which the member is employed shall file a written statement with the comptroller approving such continuance, and
2. The medical board shall certify that such member is physically fit to perform the duties of his position, and

3. The state civil service commission shall find that:

   (a) Such member is less than seventy-eight years of age, and

   (b) His continuance in service would be advantageous because of his expert knowledge and special qualifications.

The service of any such member may, however, be terminated at any time by the head of the department in which he is employed upon sixty days written notice to such member."

REASON FOR DENYING CERTIORARI

The Court below correctly held that Section 70 of the New York Retirement and Social Security Law, which provides for mandatory retirement of members of the state employees' retirement system at the age of 70, is constitutional in all respects.

Petitioner challenges the constitutionality of Section 70 of the New York Retirement and Social Security Law, pursuant to which he was mandatorily retired, on the grounds that (a) it abridges the fundamental right to work (Complaint, ¶ 31); (b) it permits the termination of a tenured employee without procedural due process (Complaint, ¶ 33); (c) it creates an irrebuttable presumption based upon age (Complaint, ¶ 35); (d) it results in a denial of equal protection (Complaint, ¶¶ 36, 37); (e) it impairs the contractual relationship of tenured civil service employees (Complaint, ¶ 41); and (f) it permits an unconstitutional delegation of authority to those who must administer it (Complaint, ¶¶ 31, 37).* There is no merit to any of these

* Petitioner also claims that his termination violated the Eighth Amendment prohibition against cruel and unusual punishment.

(footnote continued on following page)

claims. Indeed, they have been rejected in a variety of contexts by virtually every court which has considered them, including this Court. *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976) (mandatory retirement of state police officers at age 50); *McIlvaine* v. *Pennsylvania,* 415 U.S. 986 (1974) (mandatory retirement of state police officers at age 60); *Rubino* v. *Ghezzi,* 512 F. 2d 431 (2d Cir. 1975), *cert. denied* 423 U.S. 891 (1975) (mandatory retirement of state court judges at age 70); *Weisbrod* v. *Lynn,* 383 F. Supp. 933 (D. D.C. 1974) (three-judge court), *aff'd.* 420 U.S. 940 (1975) (mandatory retirement of federal civil service employees at age 70); *Talbot* v. *Pyke,* 533 F. 2d 311 (6th Cir. 1976) (mandatory retirement of municipal employees at age 70). Accordingly, the Court of Appeals correctly held that the complaint should be dismissed insofar as it challenges Section 70.

Contrary to petitioner's assumption, there is no constitutionally protected right to public employment. See *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 896 (1961). Nor is a classification based upon old age a "suspect class" comparable to classification based upon sex, race or national origin. *Frontiero* v. *Richardson,* 411 U.S. 677, 686 (1973). If there were any doubts in this regard they were resolved by this Court in its opinion in the *Murgia* case. The Court stated:

> "This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental. See *San Antonio School District* v. *Rodriguez,* [411 U.S. 1 (1973)]; *Lindsey* v. *Normet,* 405 U.S. 56, 73 (1972); *Dandridge* v. *Williams,* [397 U.S. 471] at 485. . . .
>
> "Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal

(footnote continued from preceding page)

However, as this Court very recently reaffirmed, such a claim has no place in the context of a civil proceeding. See *Ingraham* v. *Wright,* 430 U.S. 651(1977).

protection analysis. *Rodriguez, supra,* at 28, observed that a suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'. While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." 427 U.S. at 313.

Since petitioner has not shown either the existence of a fundamental right or a suspect classification his equal protection claim is not subject to "strict judicial scrutiny" but must simply satisfy the "rational basis standard". *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. at 314. Section 70 easily meets this test.

The main purposes to be accomplished by Section 70 are greater efficiency and economy in the state service, on the one hand, and the advancement and promotion of younger members of the civil service, on the other. Plainly, the mandatory retirement of employees reaching the age of 70 is a reasonable means for furthering these valid State interests. *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970); *Turner* v. *Fouche,* 396 U.S. 346, 362 (1970). Contrast *Gault* v. *Garrison,* 569 F. 2d 993 (7th Cir. 1977). Moreover, contrary to petitioner's assumption, these state interests are not undercut by studies which show that many elderly workers are productive, particularly in light of the fact that Section 70 permits appropriate extensions where the employee is fit *and* it is advantageous to his employer. Therefore, Section 70 does not violate petitioner's right to equal protection vis-a-vis those employees under the age of 70.

Nor has petitioner been denied equal protection vis-a-vis persons over 70 whose service has been continued pursuant to the statute. As the Court below properly noted, the status of those employees is not based upon a classification established by the State, but merely upon individual determinations by agency heads made on a case-by-case basis. The statute specifically requires that each extension in service beyond age seventy be made only where such extension would be advantageous to the employing agency because of the employee's expert knowledge and qualifications. Section 70(c)(3). Therefore, absent an allegation that the determination not to continue him was based upon a constitutionally impermissible standard, e.g. race, petitioner has no more shown a violation of his constitutional rights than has any person who, in the ordinary course, is not hired for a particular job. See *Mount Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977).*

The absence of a fundamental right or suspect classification also defeats petitioner's claim that Section 70 establishes an unconstitutional irrebuttable presumption. *Rubino* v. *Ghezzi,* 512 F. 2d 431, 433 (2d Cir. 1975). Indeed, in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), in which this Court held unconstitutional a presumption based upon sex, the Court expressly distinguished between classifications based on such "non-suspect" criteria as "intelligence or physical disability" and such factors as "sex", "race" or "national origin". 411 U.S. at 686. In any

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*Petitioner contends in ¶ 31 of the Complaint that Section 70 results in an unconstitutional delegation of discretion to those who must administer it. The contention is frivolous on its face. The statute does not confer arbitrary discretion. On the contrary, it contains clearly ascertainable and sufficiently defined standards to guide administrators in an area where flexibility is desirable to implement the State's policy.

event, since Section 70 does permit continued employment past the age of 70 in appropriate cases, as a practical matter the presumption made by Section 70 is rebuttable at least to that extent.

Petitioner's claim that he was "deprived of his tenured civil service position without procedural due process" (Complaint, ¶ 33) puts the cart before the horse. The guarantees of due process are not called into play unless the government's action has affected a property or liberty interest. Mandatory retirement pursuant to Section 70 affects neither.

As a civil service employee, the terms and conditions of petitioner's employment and, hence, the extent of his property interest were defined by statute. *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972); *Jones* v. *Hopper,* 410 F. 2d 1323, 1328 (10th Cir. 1969) (*en banc*). Section 70 was one of those conditions and it was binding on petitioner. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). Pursuant to Section 70(b), petitioner's permanent status ended automatically when he reached age 70, and with it ended his entitlement to a hearing before termination under Section 75 of the Civil Service Law. See *Toban* v. *New York State Employees' Retirement System,* 33 A D 2d 965, 307 N.Y.S. 2d 78 (3d Dept. 1970).* When his employment was continued past the age of 70 pursuant to Section 70(c), his job security derived solely from that section. Significantly, Section 70(c) specifically provides that such continued service may be terminated at any time upon 60 days written notice to the employee. See *Nurenberg* v. *Ward,* 51 A D 2d 1022, 381 N.Y.S. 2d 412 (2d Dept. 1974), which upheld

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* This being a condition of petitioner's employment, there is no basis for his present claim that mandatory retirement impaired his "implied contract with the State that he [would] be continued in employment so long as he remains fit and meritorious" (Complaint, ¶ 41). *Bishop* v. *Wood,* —— U.S. ——, 48 L.Ed. 2d 684 (1976).

the constitutionality of the 60 day notice provision against an attack made on equal protection and due process grounds. Petitioner, therefore, erroneously assumes that he was deprived of a property right.

Nor does mandatory retirement because of age affect a protected liberty interest. In *Arnett* v. *Kennedy,* Mr. Justice Rehnquist, writing for the plurality, stated that an employee's interest in liberty under the Fourteenth Amendment "is not offended by dismissal from employment itself" although the dismissal is based upon a finding of cause. 416 U.S. at 157. On the contrary, the employee's liberty interest is offended only when his dismissal is "based upon an unsupported charge which could wrongfully injure [his] reputation" (*Id.*)—a charge such as "dishonesty, or immorality". *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972). It is evident that Section 70, which provides for automatic retirement, results in no such injury. Cf. *Russell* v. *Hodges,* 470 F. 2d 212 (2d Cir. 1972); *Wahba* v. *New York University,* 492 F. 2d 96 (2d Cir. 1974), *cert. denied* 419 U.S. 874.

In any event, as the Circuit Court determined, petitioner's due process argument should be rejected even if Section 70 affected a protected interest since

> "the administrative cost to the state of providing each retiree with a hearing would be enormous, and by far outweighs the hardship to the individual." 566 F. 2d 869.

In short, petitioner has failed to show that there is anything about the operation of the provisions of Section 70 to distinguish it from all of the other mandatory retirement statutes which have been upheld. Therefore, his attack on the statute is without merit, as the Court below properly held, and there is no call for any review by this Court.

CONCLUSION

For the foregoing reason the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 11, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1444

CAROL C. JOHNSON,

Petitioner,

—v.—

LOUIS J. LEFKOWITZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED APRIL 11, 1978

PETITIONER'S BRIEF IN REPLY TO THE BRIEF FOR RESPONDENTS IN OPPOSITION FILED MAY 15, 1978

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May 30, 1978

IN THE

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OCTOBER TERM, 1977

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To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States

Respondents' brief in no way attempts to meet the question of the conflict between the federal courts of appeal set forth in the Petition, which unless passed upon by this Court will continue to result in endless confusion and repeated applications for writs of certiorari to this Court for settlement of the questions involved and will continue to adversely affect the lives of 20,000,000 citizens over 65 years of age and their countless dependents.

Petitioner respectfully requests that the Petition for Writ of Certiorari be granted to allow appellate review herein so that the questions involved may be fully briefed and argued before this Court or return for the case to go to trial.

The following may help to illustrate why a full hearing should be had. (All emphasis is supplied.)

On page 2 of the Respondents' Brief is a statement under the heading "FACTS" which statement is contrary to the allegations of the Complaint which Respondents' pre-answer motion addressed to the Complaint admits to be true.

He states that Petitioner—a *tenured* attorney—an employee in the Law Department *was mandatorily retired when he reached the age of 70.*

This he would like the Court to believe so that the Court would accept his statement on page 10, line 18, that pursuant to Section 70(b) of the N.Y.S. Superannuation Retirement Act, Petitioner's permanent tenured competitive classified Civil Service Senior Attorney-Realty status ended automatically when he reached age 70 and with it ended his entitlement to a hearing before termination.

Yet Mr. Lefkowitz knows that Section 70(c) states clearly that NOTWITHSTANDING Section 70(b) continuances can be granted—even up to age 78 and he knows that under said Section (c) he consented to such continuances up to March 31, 1974.

Mr. Lefkowitz also knows that as Attorney-General he wrote a formal opinion on May 29, 1964 to the Civil Service that "it would be extremely difficult to rationalize a determination that an employee in 'Government Service' as defined in Retirement and Social Security Law Section 2 Subdivision 11, working each day as an employee of

the State and receiving full salary (and such is Petitioner's case-supplied) had been retired by 'operation of law' for a period of several years • • • ".

The headnote to that opinion states that the man had remained in State service beyond the age of 70.

Thus Mr. Lefkowitz interpreted the direction to retire the man at 70 to be suspended during the period that he was continued in his position as employee after age 70.

Clearly he knows that there was no retirement by operation of law of Petitioner herein upon the attainment of age 70 since he had consented that Petitioner herein be continued, as authorized by Section 70(c), by two continuances, first from June 30, 1973 thru December 31, 1973 and then thru March 31, 1974.

A letter from Mr. Lefkowitz's office dated April 10, 1974 states "upon occasion of your RECENT retirement • • • ".

"Recent" would be March 31, 1974 not June 30, 1973.

Even as to the later date, March 31, 1974, the complaint alleges that there was no retirement simply an involuntary taking of Petitioner from the pay-roll. No notice ever having been given to Petitioner as to what if anything had been done with his third request for continuance —just arbitrary, capricious removal under color of state authority of Petitioner from the pay-roll as the complaint alleges and which is admitted as true.

A letter from the N.Y.S. Employees' Retirement System dated July 16, 1974 states—your retirement allowance is based on 11 years and 3 months of service. (January 1963 thru March 31, 1974.)

There was no retirement before the end of March 31, 1974 as can be seen from this letter.

Mr. Lefkowitz may even know of a formal opinion written by one of his predecessors, namely, Attorney-General John J. Bennett, Jr., to the Civil Service in 1941 reading as follows, "While I adhere to the view that in general, such applications should be made in advance of the required retirement date, I do not believe that the statutory provisions can be read as absolutely mandatory but should be interpreted as DIRECTORY."

Clearly the provision for continuances in Section 70(c) which can be granted NOTWITHSTANDING Section 70(b) indicates that the SHALL in Section 70(b) is DIRECTORY not MANDATORY.

The word is SHALL be retired not MUST be retired.

At no time, except by arbitrary and capricious action such as alleged in the Complaint, could Petitioner herein be CONSTITUTIONALLY taken off the payroll until his duly and timely third application for continuance had been duly processed as provided by the provisions of Section 70.

In the *Nurenberg* v. *Ward* case cited on page 10 of the Respondents' Brief the papers filed in the Appellate Division—one set sent to the Bar Association in New York City—shows that no brief was filed in support of the appeal.

The record on appeal further discloses that the verified answer in the case states that the employee was given notice that due to BUDGET CUT his employment was being terminated and the notice, also in the record, states that his retirement was made because of budget cut.

These matters can only be adequately treated by granting certiorari and setting the case for full briefs and oral argument or by reversal and sending the case on its way

to a trial to include the question of the constitutionality of the statute itself as well as the consitutionality of the abuse of its administration.

Most respectfully submitted,

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